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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,
Appellants,

v

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan Corporation,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF APPELLEE MICHIGAN STATE CHAMBER OF COMMERCE TO AFFIRM

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QUESTIONS PRESENTED

The questions presented by this Motion to Affirm are whether any substantial question on the merits exists and whether further argument is required in this case where the Court of Appeals was so obviously correct in ruling that a state cannot prohibit "independent expenditures" for advocacy by an ideological nonprofit corporation when:

(a) There is no evidence of actual corruption resulting from an ideological nonprofit corporation's "independent expenditures" for advocacy;

(b) The prohibition against advocacy applies to all corporations, regardless of their size, wealth or purpose; and

(c) The prohibition against advocacy does not apply to individuals, labor unions or other unincorporated associations.

PARTIES TO PROCEEDINGS BELOW

Original parties before the United States Court of Appeals for the Sixth Circuit were: (1) Richard H. Austin, the Michigan Secretary of State, and Frank J. Kelley, the Michigan Attorney General, the Appellants, who at all times were represented by the Michigan Attorney General; and (2) the Michigan State Chamber of Commerce ("State Chamber"), a Michigan nonprofit corporation, the Appellee. The State Chamber does not have any parent companies, subsidiaries or affiliates.

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MOTION TO AFFIRM

Pursuant to S.Ct. R. 16.3(c) and 16.3(d), the State Chamber moves to affirm the decision of the Court of Appeals. The motion is grounded on the fact that no substantial question on the merits exists and that this Court may reasonably conclude that the decision below is so obviously correct as to warrant no further argument.

STATE STATUTE INVOLVED

The constitutionality of Section 54(1) of the Michigan Campaign Finance Act, 1976 Mich. Pub. Acts 388, Mich.

Comp. Laws Ann. § 169.254(1) (West 1988 Supp.), is at issue in this case:

> Except with respect to the exceptions and conditions in subsection (2) and (3) and Section 55, and to loans made in the ordinary course of business, a corporation may not make a contribution or expenditure.

The State of Michigan applies Section 54(1) of Act 388 in a manner that not only prohibits corporate "contributions" and corporate "expenditures," but that also wholly prohibits corporate "independent expenditures." An "independent expenditure" is defined as:

> "Independent expenditure" means an expenditure as defined in Section 6 by a person if the expenditure is not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee. [Emphasis added] [Mich. Comp. Laws Ann. § 169.209(1)]

PROCEDURAL HISTORY

On May 24, 1985, the State Chamber filed a complaint in the United States District Court for the Western District of Michigan challenging Michigan's prohibition against corporate "independent expenditures" in support of or in opposition to a candidate for political office[1] as violating the State Chamber's free expression and equal protection rights under the United States and Michigan Constitutions.

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[1] "Independent expenditures in support of or in opposition to a candidate for political office" shall be referred to simply as "independent expenditures."

The Trial Court found that, despite the lack of any evidence of corruption, Section 54(1) does not infringe upon the State Chamber's free expression or equal protection rights. The Trial Court concluded that the mere alleged threat or appearance of corruption was sufficient to sustain the prohibition against the State Chamber's advocacy through "independent expenditures." *Michigan State Chamber of Commerce v. Austin*, 643 F. Supp. 397 (W.D. Mich. 1986).

On appeal, the Court of Appeals concluded that, because the State Chamber was a nonprofit ideological corporation, the mere threat or appearance of corruption does not constitute a compelling state interest sufficient to justify an infringement on First Amendment freedoms. The Court of Appeals held that the state had failed to make the necessary showing of actual corruption required to uphold Section 54(1). As a result, the Court of Appeals did not find it necessary to consider the State Chamber's arguments that Section 54(1) is not "precisely drawn" or that it violates the State Chamber's equal protection rights.

On December 14, 1988, the Court of Appeals denied the state's Petition for Rehearing *En Banc*. The state filed its claim of appeal on March 1, 1989, and on March 13, 1989, the State Chamber received the state's Jurisdictional Statement.

STATEMENT OF FACTS

The State Chamber, a Michigan nonprofit membership corporation, has approximately 8,000 members, who represent, among other things, manufacturing, retail, agriculture, finance, construction and wholesale businesses. Approximately 15% of the members have 10 employees or less; 57% have 50 employees or less; and 80% have 100 employees or less. Only 20% of its members have more than 100 employ-

ees. Thus, contrary to the state's mischaracterization, 75% of the State Chambers' members are *not* profit-making business corporations *such as* General Motors, Ford and Chrysler. (Jurisdictional Statement, p. 9.)

The State Chamber is an ideological corporation formed to promote the common good and interests of the Michigan business community. It is important for the State Chamber to be involved in electoral politics because elected officials make decisions in the legislative and regulatory arenas directly affecting the business community.

In addition, unincorporated associations, such as labor unions, are involved in the electoral process but are not prohibited at all from speaking through "independent expenditures." Thus, it is important for the State Chamber to also directly participate because labor unions often line up on the opposite sides of issues and candidates from the business community.

ARGUMENTS

I.

THE COURT OF APPEALS WAS OBVIOUSLY CORRECT IN HOLDING SECTION 54(1) UNCONSTITUTIONAL AS APPLIED TO THE STATE CHAMBER.

The state argues that the Court of Appeals' decision is manifestly inconsistent with prior decisions of this Court, and that it will allow profit corporations to use the State Chamber and other ideological corporations as conduits for political activity. As will be shown, the Court of Appeals' decision is entirely consistent with this Court's prior decisions on "independent expenditures," and the state's conduit argument is unfounded and clearly does not justify the flat prohibition against the State Chamber's advocacy through "independent expenditures."

A. THE COURT OF APPEALS' DECISION IS ENTIRELY CONSISTENT WITH PRIOR SUPREME COURT DECISIONS.

The state argues that the Court of Appeals' decision is contrary to this Court's decisions in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) ("*MCFL*"), and *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982) ("*NRWC*"). The Court of Appeals, however, fully considered and correctly applied Supreme Court precedent, including this Court's intervening decision in *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 106 S.Ct. 1459, 84 L.Ed.2d 455 (1985) ("*NCPAC*") (which the state has continuously ignored throughout this litigation).

The state argues that *NRWC* is plainly applicable to corporate "contributions" *and* corporate "expenditures." The Court of Appeals correctly noted, however, that the "contributions" analysis applied in *NRWC* does not apply in an "independent expenditure" case:

> Despite the opportunity to do so, the [Supreme] Court did not extend the compelling state interest analysis of contribution limitations in *National Right to Work Comm.* to the independent expenditure limitations which FECA places on nonprofit corporations organized to disseminate political ideas. [Jurisdictional Statement App., p. 19a]

NRWC was a "*contributions*" case—not an "*independent expenditures*" case. This Court has repeatedly explained that *NRWC* is *not* dispositive of, or contrary to, "independent expenditures" cases:

> *National Right to Work Committee*, does not support the inclusion of MCFL within §441b's restrictions on direct independent spending . . . [T]he political activity at issue in that case was *contributions*, as the committee had been established for the purpose of making direct contributions to political candidates. 459 U.S., at 200, 103 S.Ct., at 555. We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending. [*MCFL, supra*, 479 U.S. at 259-260]

See also *NCPAC, supra*, 470 U.S. at 495-496. Thus, the Court of Appeals' decision on "independent expenditures" is both reconcilable and consistent with this Court's decision on "contributions" in *NRWC*.

In *NCPAC* and in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), this Court recognized the fundamental constitutional difference between "contributions" and "independent expenditures." Because of this difference, this Court has consistently concluded that "independent expenditures" do not cause real or apparent corruption. In *Buckley, supra*, 424 U.S. at 47, this Court found:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as quid pro quo for improper commitments from the candidate.

See also *NCPAC, supra*, 470 U.S. at 497.

A corporate "independent expenditure" does not differ from an individual "independent expenditure" (*Buckley, supra*) or a PAC "independent expenditure" (*NCPAC, supra*) in a way which would affect this Court's conclusion that "independent expenditures" by their very nature do not cause real or apparent corruption.

In *MCFL*, this Court closely examined three features of MCFL and concluded that, with a nontraditional corporation formed to disseminate political ideas and not to amass capital, the mere threat or appearance of corruption "hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *MCFL, supra*, 479 U.S. at 263. Because there was no evidence of actual corruption, the prohibition against MCFL's "independent expenditures" was unconstitutional under the First Amendment.[2]

The State Chamber shares the same attributes and features as MCFL which led this Court to conclude that a prohibition against "independent expenditures" was unconstitutional. The State Chamber is a nonprofit corporation formed to disseminate ideas—not to amass capital. The state notes that the State Chamber is formed for and advocates on behalf of "business interests." This fact does *not* prove that the State Chamber's "independent expenditures" cause real or apparent corruption. Individual "independent expenditures" and "independent expenditures" by other economic entities such as labor unions and partnerships may also be made for business purposes. This does not necessarily mean, however, that they will cause real or apparent corruption.

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[2] Each and every time this Court has considered the constitutionality of a prohibition against corporate "independent expenditures," it has held the prohibition unconstitutional under the First Amendment. *First National Bank of Boston* v *Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978); *NCPAC, supra*; and *MCFL, supra*.

Like MCFL, the State Chamber's resources are not "a function of its services in the economic marketplace." Rather, as with MCFL, its resources are acquired as a result of its "popularity in the political marketplace."

B. THE STATE'S CONDUIT ARGUMENT DOES NOT JUSTIFY THE FLAT PROHIBITION AGAINST THE STATE CHAMBER'S FREE EXPRESSION RIGHTS.

The state nonetheless insists that because the State Chamber, unlike MCFL, has profit corporation members, the state can deny its First Amendment rights because the State Chamber might be used as a "conduit."[3] This attempted distinction between the State Chamber and MCFL does not justify the prohibition against the State Chamber's "independent expenditures."

First, there exist unincorporated organizations in Michigan which are tax-exempt (IRC §501(c)(6) business league) membership organizations, like the State Chamber, which have profit corporate members. These organizations are not prohibited from making "independent expenditures." The mere fact that the State Chamber made the decision to incorporate does not suddenly create the spectre of corruption through a conduit.

Second, as the Court of Appeals correctly noted, reporting obligations would preclude, as a practical matter, "faceless" corporate members utilizing the State Chamber as a conduit. Alternative less restrictive means, short of the outright prohibition of protected speech, are available to forestall any alleged "conduit" problem. A broad prophylactic rule can-

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[3] The state's argument assumes that it can constitutionally limit the free speech of profit corporations. This Court, however, has never decided the constitutionality of a prohibition against a profit corporation's "independent expenditures."

not justify treating the State Chamber any differently than MCFL, especially when "independent expenditures" as opposed to "contributions" are involved. *MCFL, supra*, 479 U.S. at 260.

The Court of Appeals noted that Section 51 of the Campaign Finance Act provides a reporting mechanism that will prevent the State Chamber from being used as a conduit. The state argues that Section 51 does not apply to corporations and that the Court of Appeals' decision must be overruled or the voting public will be denied the identities of individuals who financed the "independent expenditures" of nonprofit ideological corporations. In effect, the state concludes that, since Section 51 does not apply, the *only* alternative available is to *prohibit* "independent expenditures" by the State Chamber. The fact that the Legislature has not yet enacted a reporting requirement similar to Section 51 which applies to corporations like the State Chamber, however, cannot justify the state's absolute denial of the State Chamber's fundamental First Amendment rights to free speech and advocacy.

The Court of Appeals examined this Court's decisions in *MCFL, NCPAC, First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), and *Buckley*, considered the facts that have led this Court to consistently hold every prohibition against "independent expenditures" to be unconstitutional; and, in the absence of any evidence of actual corruption, correctly decided that such a prohibition as applied to a nontraditional ideological corporation like the State Chamber is also unconstitutional under the First Amendment.

II.

THE PROHIBITION AGAINST THE STATE CHAMBER'S "INDEPENDENT EXPENDITURES" IS NOT NARROWLY TAILORED.

Not only must the prohibition against the State Chamber's "independent expenditures" serve the compelling state interest in preventing real or apparent corruption, it must also be narrowly tailored to serve that interest. *See Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530, 535, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).

While the Court of Appeals did not reach this issue, even if there had been some proof of real or apparent corruption resulting from the State Chamber's "independent expenditures" or from profit corporations' membership in the State Chamber—which there was not—the Court of Appeals' decision should be affirmed because Section 54(1) is a fatally overbroad and underbroad response to this alleged evil.

All profit and nonprofit corporations, including charitable corporations, incorporated trade associations, professional corporations, large multinational corporations, and small closely-held corporations, regardless of size, wealth, purpose, or influence, are indiscriminately prohibited from advocating through "independent expenditures."

Act 388 does not similarly limit such direct advocacy by individuals, labor unions, business partnerships, limited partnerships, or other unincorporated organizations. A closely-held corporation employing 10 workers cannot comment on the qualifications of candidates, or join with another closely-held corporation to voice its concerns, but a labor union representing the interests of tens of thousands of workers can freely speak through "independent expenditures." There is no factual basis for finding that the potential for corruption or the appearance of corruption arising from "independent

expenditures" differs between these two organizations, i.e., is greater for the small corporation than for the labor union.

Thus, not only is Section 54(1) overbroad in including all corporations, but it is underbroad as well, under the state's reasoning, because it does not include other wealthy, influential economic entities in our society such as labor unions. The inclusion of all corporations, regardless of their size, wealth, or purpose, and the exclusion of other economic entities, such as labor unions and partnerships, undermines the plausibility of the state's purported concern regarding real or apparent corruption arising from "independent expenditures." *See Bellotti, supra*, 435 U.S. at 793.

Accordingly, even if this Court were to disagree with the Court of Appeals and conclude, even in the absence of proof, that some corporate "independent expenditures" may pose a potential for real or apparent corruption, it should affirm the Court of Appeals' reversal of the Trial Court's decision on the basis that Section 54(1) is not narrowly tailored to serve the state's purported interest in preventing real or apparent corruption.

III.

THE DISPARATE TREATMENT OF THE STATE CHAMBER VIS-A-VIS LABOR UNIONS AND OTHER UNINCORPORATED ORGANIZATIONS VIOLATES THE EQUAL PROTECTION CLAUSE.

The Court of Appeals did not find it necessary to reach the State Chamber's equal protection challenge. Should this Court disagree with the Court of Appeals' conclusions regarding the First Amendment, however, it should nonetheless affirm the Court of Appeals' reversal of the Trial Court's decision on equal protection grounds.

The prohibition against the State Chamber's "independent expenditures" is subject to strict scrutiny because it burdens the exercise of the fundamental First Amendment right of free speech. *See Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); *Bellotti, supra*, 435 U.S. at 785-786; *Buckley, supra*, 424 U.S. at 14; *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).

Strict scrutiny requires that distinctions drawn by the state must be precisely tailored to serve a compelling state interest. *See e.g. Plyler v. Doe*, 457 U.S. 202, 216-217, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). In order to meet this test, the state must prove that the State Chamber's "independent expenditures" are clearly more harmful than the "independent expenditures" of noncorporate entities, such as labor unions, which are not prohibited under Act 388 from making "independent expenditures."

In *Mosley, supra*, 408 U.S. at 92-102, this Court held that a Chicago ordinance prohibiting picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute, violated the Equal Protection Clause of the Fourteenth Amendment:

> Although preventing school disruption is a city's legitimate concern, Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school. Therefore, *under the Equal Protection Clause, Chicago may not maintain that picketing disrupts the school unless that picketing is clearly more disruptive than the picketing Chicago already permits. Cf. Tinker v. Des Moines School District*, 393 U.S. 503, 511 (1969); *Wirta v. Alameda-Contra Costa Transit District*, 68 Cal.2d 51, 434 P.2d 982 (1967). If peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing, both peaceful and nonpeaceful.
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> * * *
>
> Given what Chicago tolerates from labor picketing, the excesses of some nonlabor picketing may not be controlled by a broad ordinance prohibiting both peaceful and violent picketing. *Such excesses can be controlled by narrowly drawn statutes, Saia v. New York, 334 U.S. at 562, focusing on the abuses and dealing evenhandedly with picketing regardless of subject matter.* [Emphasis added] [Footnote omitted] [*Mosley, supra*, 408 U.S. at 100-101]

Michigan allows labor unions and other unincorporated organizations to make "independent expenditures." There was absolutely no showing that the State Chamber's "independent expenditures" would result in *any* real or apparent corruption, let alone that its "independent expenditures" would be *more* harmful than "independent expenditures" made by labor unions or by organizations similar to the State Chamber which have chosen not to incorporate.

Judicial notice may be taken of the fact that "big labor" is as powerful (and as capable of corruption) as big corporations (and certainly more so than small corporations). The views of corporations and labor unions vary significantly and are frequently in direct opposition to one another in the electoral process. Act 388's disparate treatment of corporations and labor unions and other unincorporated organizations thus often results in giving one side of debatable public questions an advantage in expressing its views to the people. As this Court stated in *Bellotti, supra*, 435 U.S. at 777:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) . . . Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended. [Footnote omitted]

Given what the state tolerates from labor unions' and other unincorporated organizations' "independent expenditures," the alleged danger from some corporate "independent expenditures" may not be controlled by a broad statute prohibiting all corporate "independent expenditures." *Mosley, supra.* In the absence of any valid justification for treating corporations such as the State Chamber any differently than labor unions or other unincorporated associations, the state must deal even-handedly with all speakers regardless of their corporate status. The Court of Appeals' reversal of the Trail Court's decision, therefore, should be affirmed on equal protection grounds.

CONCLUSION

As shown above, no further argument is necessary in this case because the decision of the Court of Appeals was so obviously correct and because no substantial question on the merits exists. The State Chamber, therefore, respectfully requests this Court to grant its motion to affirm the decision of the Court of Appeals.

Respectfully submitted,

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